No. 12,292

IN THE

United States Court of Appeals

For the Ninth Circuit

HYMAN A. KRONBERG, a Minor, by his guardian ad litem, William Farnum White,

Appellant,

vs.

MAJOR GENERAL WILLIS H. HALE, COLONEL WENTWORTH GOSS and M/SGT. HAROLD M. DART,

Appellees.

BRIEF FOR APPELLEES.

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JURISDICTIONAL STATEMENT.

This is an appeal (Tr. 76-77) from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's motion for summary judgment as to the first cause of action, on the issue of liability alone, and granting appellees' motion for summary judgment as to the aforesaid first cause of action (Tr. 74). The Court below entertained the motions for summary judgment under Rule 56 of the

Federal Rules of Civil Procedure. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28 U.S.C.A. Sections 1291 and 1294.

STATEMENT OF THE CASE.

The facts and issues of this case are clearly set forth by the Court below in its memorandum opinion (Tr. 67-73), which appellees now quote in full:

"MEMORANDUM OPINION

ROCHE, District Judge: This matter is before the court on two motions for summary judgment as to plaintiff's first cause of action in which he seeks damages for false arrest and false imprisonment. Plaintiff has moved for summary judgment, interlocutory in character, on the issue of liability alone. Defendants Major General Willis H. Hale, Colonel Wentworth Goss and M/Sgt. Harold M. Dart have likewise moved for summary judgment. Pursuant to stipulation, the action has been dismissed as to the defendants Colonel Thomas B. White, M/Sgt. Joseph Glass and Major Ivan A. Allen. The motions have been submitted on an agreed statement of facts.

The basic question for decision is whether the military had jurisdiction to arrest this civilian plaintiff under the 94th Article of War. This Article deals with frauds against the United States and the applicable portion reads: 'If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him

for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, *he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so separated therefrom.'* (Emphasis supplied.) Plaintiff's suit arose out of his arrest and imprisonment pursuant to this provision.

The agreed statement sets forth the following facts. Plaintiff was discharged from the Air Force at Hamilton Field, Marin County, California, on April 7, 1947. On April 29, 1947, while he was in uniform, he was arrested by San Francisco police. He was taken to the Taraval Police Station and the Provost Marshal at Hamilton Field notified, the police suspecting plaintiff of being absent without leave. The Provost Marshal sent two Criminal Investigation Division agents, one of whom was the defendant Dart, to Taraval Police Station to make an investigation and report and upon the plaintiff's statement that he had been discharged from the Army, a Special Agent of the Federal Bureau of Investigation was called in to assist in the case. Both plaintiff and his wife consented to a search of their home by the Special Agent, with the resultant discovery of a parachute and many articles of Army clothing and other gear, valued at more than $700, plus three letters indicating that this property had been fraudulently procured.

Plaintiff, who was still being held at the Police Station, then stated that the parachute had been issued to him at Hill Field, Utah, and that he had

not got around to turning it in, and that all the Army clothing had been purchased at surplus stores.

Between ten and eleven o'clock on the night of April 29, one of the CID agents reported by telephone to the Provost Marshal, who directed him to arrest and bring in the plaintiff. This was done and the plaintiff was confined in the Guardhouse at Hamilton Field, pending trial under the 94th and 96th Articles of War. On July 11, 1947, court-martial charges under the 94th Article of War were filed, alleging that plaintiff had knowingly and unlawfully applied to his own use one parachute and had feloniously taken and carried away the remaining government property discovered when his home was searched. These charges were served on the plaintiff on July 14, 1947, on which date he filed in this court a petition for writ of habeas corpus and an order to show cause issued. This order was heard on July 21, 1947, when by stipulation the petition was dismissed and the order to show cause discharged and plaintiff was released from military control to the United States Marshal and held in bail set at $500. The present action for damages was filed in the state court and removed to this court by certiorari.

The parties have stipulated that the following four issues are to be determined at this time: (a) Did defendant Colonel Wentworth Goss (commanding officer at Hamilton Field during plaintiff's confinement) have jurisdiction to arrest the plaintiff under the 94th Article of War; (b) Assuming that Colonel Goss had such jurisdiction, did it lapse by reason of the lengthy delay be-

fore filing court-martial charges under the 94th Article; (c) Is the plaintiff entitled to actual damages by reason of his confinement from April 29, to July 22, 1947; (d) Is the plaintiff entitled to punitive damages because of such confinement.

Jurisdiction is the critical issue and it depends, in the first instance, on the constitutionality of Article 94. It is undisputed that plaintiff had served in the Army, had been honorably discharged, and was a civilian at the time of his arrest. It is further undisputed that he was not subjected to military arrest and imprisonment until after investigation had disclosed a substantial quantity of Government property in his possession, together with letters indicating strongly that such property had been either illegally obtained while he was in the service or illegally retained after his discharge. He therefore came squarely within the provision of Article 94 that makes the discharged soldier who is guilty of defrauding the Government liable to military arrest and courtmartial in the same manner and to the same extent as if he had not been separataed from the service. Thus in ordering and making the arrest the defendants were not acting maliciously or in bad faith but, on the contrary, were performing a duty authorized by law and one which they had probable cause for believing necessary.

Plaintiff, however, takes the position that probable cause and good faith are unimportant because the pertinent provision of the 94th Article violates the Fifth Amendment which guarantees prosecution by presentment or indictment of a Grand Jury "except in cases arising in the land or naval forces." Plaintiff argues that a "case"

has not arisen until some step toward prosecution has been taken and if no step is taken prior to the soldier's return to civilian status, Congress is powerless to extend military jurisdiction over such discharged soldier.

There is some merit in the plaintiff's contention, particularly in view of the fact that our legal and political philosophy has never encouraged the extension of military jurisdiction over civilians, and it is unfortunate that this important question has never reached the higher courts for a definitive answer. With one exception, the few cases that have considered the point have held the provision constitutional. The first reported decision is that of *In re Bogart,* 3 Fed. Cas. 796, 799, No. 1,596, decided in 1873. There the court construed the phrase 'cases arising', as used in the Fifth Amendment, to mean 'events occurring' and held that, so construed, it covered an offense committed while the person was serving with the armed forces, even though prosecution was not instituted until after his discharge. The Bogart case was followed in *Ex parte Joly,* 290 Fed. 858, and *Terry v. United States,* 2 F. Supp. 962. The Joly case also stressed the fact that the 94th Article had been on the books since 1863 without being declared unconstitutional. The more recent case of *United States ex rel Flannery v. Commanding General,* 69 F. Supp. 661, held the Article unconstitutional, the court basing its decision on much the same grounds as those advanced in this case. The Flannery case was reversed by stipulation in the Court of Appeals for the Second Circuit, without opinion.

In view of the foregoing and since a statute's unconstitutionality will not be presumed, the Court holds that the pertinent provision of Article 94 is valid and plaintiff's arrest was thus within the jurisdiction of the defendant Goss.

There follows, then, the question whether jurisdiction was lost because plaintiff was held for 74 days before court-martial charges were filed, plaintiff contending that the delay was excessive and in violation of Article of War 70 which governs investigation and filing procedure in court-martial proceedings. While authority is divided on the question of whether the provisions of Article 70 are jurisdictional, the most recent cases hold that they are not—see *Durant v. Hiatt,* 81 F. Supp. 949, and *Humphrey, Warden etc. v. Smith,* U. S. Supreme Court, April 25, 1949. Even if they were, the delay in this case was not excessive, the record disclosing that extensive investigation both here and on the East coast was necessary before the charges could be drawn. The jurisdiction that validly attached was thus not lost and defendants are not liable in either actual or punitive damages.

It is, therefore, by the Court ORDERED that plaintiff's motion for summary judgment as to the first cause of action, on the issue of liability alone, be and the same is hereby DENIED and that defendants' motion for summary judgment be and the same is hereby GRANTED.

Dated: June 1st, 1949.

SGD: MICHAEL J. ROCHE
United States District Judge"

ISSUES.

The Court below, pursuant to an *Agreed Statement of Facts* (Tr. 54-60), considered and determined the following issues:

> "a. That defendant Colonel Wentworth Goss did or did not have jurisdiction to arrest Hyman Ace Kronberg, plaintiff herein, under the 94th Article of War.
>
> b. Assuming that the said defendant, Colonel Wentworth Goss, had jurisdiction to arrest Hyman Ace Kronberg, plaintiff herein, that such jurisdiction did or did not lapse by reason of the lengthy delay before filing court-martial charges under Article of War 94.
>
> c. That Hyman Ace Kronberg, plaintiff herein, is or is not entitled to actual damages by reason of his confinement from 29 April 1947 to 22 July 1947.
>
> d. That Hyman Ace Kronberg, plaintiff herein, is or is not entitled to punitive damages by reason of such confinement." (Tr. 60.)

ARGUMENT.

Appellant complains in his brief that the Court below, in effect, deprived him of his right of trial by jury. It is difficult for appellees to understand such reasoning, particularly in view of the stipulation entered into between counsel that the Court below would determine whether or not the appellant was entitled to recover either actual or punitive damages. Had the Court below decided in favor of the appel-

lant rather than in favor of the appellees, a jury would have then been called upon to determine the amount of damages to which said appellant was entitled.

The appellant, in his brief, also challenges certain testimony favorable to the appellees. This testimony is found in Answers to Written Interrogatories and depositions on which counsel for appellant himself relied when he made his motion for summary judgment (Tr. 61-62). The making of the motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, was, of course, an admission by the parties that there was no genuine issue as to any material fact to be adjudicated. This belated challenge by appellant as to the factual situation of the case must, of necessity, fall of its own weight.

In considering the real issues involved herein, the following questions present themselves:

1. Is that portion of the 94th Article of War under attack constitutional?

2. Assuming, *arguendo,* that the 94th Article of War is unconstitutional, are those who proceed under its authority liable for their actions?

3. Was the 70th Article of War violated by the appellees herein, and if so, does such a violation give rise to an action for damages?

4. Assuming, also *arguendo,* that appellant is entitled to recovery, is he entitled to punitive as well as actual damages?

In defending their actions the appellees, in their answer in paragraphs VIII and IX, alleged, in pertinent part, as follows:

> "* * * defendants, and each of them, allege that the arrest and subsequent detention of plaintiff was by virtue of and in enforcement of the laws of the United States respecting the military forces thereof, to-wit, the 94th Article of War (10 USCA Sec. 1566), and that any and all acts done by them, or any of them, in the premises were done under color of and by virtue of their said offices and status before set out, and the Article of War hereinbefore mentioned.
>
> * * * that by virtue of the provisions of the 94th Article of War hereinabove mentioned, the plaintiff, being charged with commission of offenses committed while he was still in the service of the United States, was still amenable to the discipline of the United States Army Courts Martial." (Tr. 28-29.)

I.

IS THAT PORTION OF THE 94TH ARTICLE OF WAR UNDER ATTACK CONSTITUTIONAL?

The Army has asserted the right to exercise jurisdiction over a discharged soldier by virtue of that portion of Article of War 94, 10 U.S.C.A. Section 1566, set forth by the Court below in its memorandum opinion.

In this connection reference is also made to paragraph 10, page 8, Manual for Courts-Martial 1928 as Amended, wherein it is stated:

"Jurisdiction as to certain cases of fraud and embezzlement is not terminated by discharge or dismissal. See A. W. 94."

An early case, *In re Bogart,* 3 Fed. Cases 796, 799, No. 1596 (CC Cal 1873), cited by the Court below in its memorandum opinion, wherein the petitioner was held for trial by a naval court-martial for offenses alleged to have been committed while in the naval service, supported the provision of Article of War 94 for court-martial after discharge. It was contended in that case in behalf of the petitioner that jurisdiction must be exercised or, at least, must attach by an arrest and commencement of the prosecution before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal or other discharge; that Congress has no power to authorize a trial after the connection is so severed, and after the accused has become a private citizen. It was argued in support of this view that although the offense was committed while in the naval service, yet a "case" does not arise until a charge is actually made; and if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a "case arising in the land or naval forces" within the meaning of the Fifth Amendment to the Constitution. That portion of the opinion dealing with that point, and referring to the case of *Ex parte Milligan,* stated in part:

"Mr. Justice Davis, in the opinion of the Court, quotes the clause of the constitution,

'except in cases arising in the land and naval forces', and then in the very next sentence, in alluding to this class of cases, says: 'In pursuance of the powers conferred by the constitution, Congress declared the kinds of trial, and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service' thus manifestly, using the phrase 'offenses committed while the party is in the military or naval service,' is entirely synonymous with, and equivalent to, the phrase in the constitution, 'cases arising in the land and naval forces'. This indicates the construction put upon the provision by the supreme court in such terms, and under such circumstances, that we should not feel at liberty to disregard it, even if the construction were more doubtful than it appears to us to be. Indeed this seems to us to be the true construction.

There is, certainly, *no express limitation of the power of Congress to authorize a trial by court-martial, for military and naval offenses committed while the offender is in actual service, after his connection with the service has ceased.* If the limitation exists, it must be *implied from a strained and unnatural construction to be given to the clause, 'cases arising in the land and naval forces'.*

* * * * * * *

But it is the united voice of a multitude of decisions that, where there is a reasonable doubt as to the unconstitutionality of an act of Congress, the law should be sustained.

* * * * * * *

When the supreme court and its justices go cautiously and sparingly exercise this power, the

use ought to be very clear to justify a subordinate Court in assuming such responsibility. The case now under consideration presents no such clear case. *We think the acts involved in this case constitutional.*" (Italics supplied.)

Appellees rely strongly on the reasoning in this case, and believe the following language therein, at page 801, is also particularly significant:

> "This Court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositaries of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them. It is, undoubtedly, the imperative duty, and we have no doubt that it will be the pleasure, of the judiciary to jealously and vigorously maintain its own jurisdiction in its utmost extent, for the protection of the citizen in all his rights of person and property; and to confine within their proper limits the special and limited jurisdiction of other tribunals. But, while this is so, it is no less its duty to abstain from tresspassing upon, or usurping the rightful powers of any other tribunal, however limited may be the sphere of its jurisdiction. A breach of this latter duty would be no less reprehensible than a breach of the former."

The *Bogart* case was followed in *Ex parte Joly,* 290 Fed. 858 (SD NY 1922), (also cited by the Court below in its memorandum opinion). In that case an emergency lieutenant colonel was honorably dis-

charged on September 23, 1920. Subsequently he was charged with having committed various offenses between February 1920 and July 1920, among which were violations of Article of War 94. He alleged that he was subsequently commissioned a Major in the regular establishment of the United States Army on February 5, 1921 and thus was a civilian from September 24, 1920 to February 5, 1921. This officer was tried by court-martial (beginning November 11, 1921) and convicted. The Court in the opinion stated in part:

> "The ninety-fourth article was originally the Act of March 2, 1863. For nearly 60 years, therefore, the Congress has deemed it necessary, for the protection of the military arm and the nation itself, that a discharge shall not release a 'person' in the military service from liability to arrest and trial by a military tribunal for offenses committed prior to discharge. In such circumstances, *a court of first instance, under familiar rules, will not declare such statute unconstitutional, unless its infirmity is clear beyond doubt.*
>
> The constitutionality of the statute was doubted in (1895) by Colonel Winthrop, a distinguished writer on military law, but he realized that such authority as there was held otherwise. There is no controlling authority on the question, but perhaps the most interesting case is In Re Bogart, Fed. Cas. No. 1596, 2 Sawy. 396. In the face, therefore, of more than half a century of practical construction and of the reported cases, this *court will not hold the act unconstitutional.*" (Italics supplied)

See also *United States ex rel. Pasala v. Fenno,* 76 F. Supp. 203, 206 (D. Conn.), citing *United States v. Tyler,* 105 U.S. 244; *Terry v. United States,* 2 F. Supp. 962.

Trial by court-martial after discharge under Article of War 94 was also upheld in *United States ex rel. Marino v. Hildreth,* 61 F. Supp. 667 (E.D.N.Y. 1945). In that case Marino, who had enlisted in the United States Army on February 18, 1944, was honorably discharged on January 30, 1945. On May 14, 1945, Marino, while living with his father in Jersey City, New Jersey, was arrested and placed in confinement at the guard house at Mitchel Field, Long Island, N.Y. Marino was subsequently charged on July 6, 1945 with having committed various offenses, among which were violations of the 94th Article of War. He was subsequently tried by general court-martial and convicted. The constitutional question was not raised.

With reference to the unconstitutionality of the portion of Article of War 94 under consideration, the United States District Court, Southern District of New York, in *United States ex rel. Flannery v. Commanding General, Second Service Command, et al.,* 69 Fed. Supp. 661 (SD New York Feb. 21, 1946) held the reference provision of Article of War 94 repugnant to the indictment clause of the Fifth Amendment. In this connection it should be noted, however, that the *Flannery* cases were reversed without opinion, on stipulation of both parties, by the United States Court of Appeals for the Ninth Cir-

cuit in an unpublished order filed in case No. 20235, which reads as follows:

"Upon reading and filing the annexed stipulation and upon the underlying consent of William E. Slevin, Jr., Esq., attorney for the relator-respondent,

NOW, on motion of JOHN F. X. McGOHEY, United States Attorney for the Southern District of New York, attorney for the respondents-appellants herein, it is

ORDERED, that the order of the United States District Court for the Southern District of New York, dated and entered the 21st day of February, 1946, sustaining the relator's writ of habeas corpus, be and the same hereby is reversed; and it is further

ORDERED, that the writ of habeas corpus heretofore issued herein by the United States District Court for the Southern District of New York be and the same hereby is dismissed; and it is further

ORDERED, that a mandate of this Court to the foregoing effect be issued and transmitted to the Clerk of the United States District Court for the Southern District of New York, forthwith.

Dated: New York, N. Y.
April 18, 1946.

Thomas W. Swan
U.S.C.J.
Augustus N. Hand
U.S.C.J.

I hereby consent to the entry of the above order.
William E. Slevin, Jr.
Attorney for Relator-Respondent."

It should be added, that a copy of the aforesaid order, which was received from the office of the United States Attorney for the Southern District of New York, was furnished to the Court below and to counsel for the appellant.

The recent decision in the case of *Hironimus v. Durant*, 168 F. (2d) 288 (C.C.A.-4), certiorari denied, 335 U.S. 818, upholds, by implication, that portion of Article of War 94 permitting trial of military personnel by courts-martial for crimes committed while in active service. The pertinent portion of that opinion reads, at page 293, as follows:

> "Thus it has been held that a person discharged from the Navy or the Army before the commencement of a court-martial prosecution against him cannot thereafter be brought to trial before the court-martial for crimes committed while he was in active service *except as certain offenses for which the statutes make express provision.* * * * Manual for Courts-Martial, United States army, page 8, paragraph 10 * * *." (Italics supplied.)

In the case of *United States ex rel. Hirshberg v. Cooke, Commanding Officer,* 336 U.S. 210, the Supreme Court of the United States suggested by way of dictum that Congress had the power to confer court-martial jurisdiction over discharged soldiers.

Furthermore, in the case of *Kahn v. Anderson,* 255 U.S. 1, the Supreme Court decided that a person held as a military prisoner, in punishment of a military offense of which he had been convicted, is subject to military law and to trial by court martial for offenses

committed during such imprisonment, even if the prior sentence resulted in his discharge as a soldier. In this case, the Supreme Court cited, with approval, the following rule laid down in *Ex parte Reed,* 100 U.S. 13, 21:

> " 'The constitutionality of the acts of Congress touching army and navy courts martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const., art. 1, sect. 8, and amendment 5. In *Dynes v. Hoover* (20 How. 65) the subject was fully considered and their validity affrmed.' "

The analogy of the situation, in *Kahn v. Anderson,* supra, and in our case at bar, is apparent.

In view of the foregoing decisions it may be concluded that the clear weight of authority upholds the constitutionality of that portion of Article of War 94 which permits a person subject to military law to be arrested, held for trial and sentence by court martial after discharge for the commission of offenses specified therein. Here it should be called to the attention of this Honorable Court that under the 39th Article of War prosecution under the 94th Article of War has a statutory limitation of three years. Finally, it should also be noted that the Revised Articles of War approved by the Congress June 24, 1948 (62 Stat. 627) and made effective February 1, 1949, retain essentially the same provisions now contained in Article of War 94. Had there been any serious question as to the constitutionality of any of the provisions of this 94th Article of War the Congress undoubtedly would

not have reenacted it into present law. This matter of administrative interpretation placed upon an Article of War and the question of reenactment is pointedly set forth in the decision of Circuit Judge Parker in *Stout v. Hancock,* 146 F. (2d) 741 at 744, reversing the decision of the District Court, 55 F. Supp. 330:

> "It is well settled, of course, that the administrative interpretation placed upon the article is entitled to great weight, particularly in view of the fact that it has been called to the attention of Congress and that Congress has re-enacted the article without making any change in the clause relied on for the contrary interpretation. R. J. Reynolds Tobacco Co. v. Commissioner of Internal Revenue, 4 Cir., 97 F. 2d 302, 309, aff. Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 116, 59 S. Ct. 423, 83 L. Ed. 536. And aside from the question of re-enactment, it is well settled that administrative construction of a statute by the Executive Department charged with its enforcement is entitled to great weight, especially where, as here, it has continued over a long period and Congress has failed to alter or amend the statute. Costanzo v. Tillinghast, 287 U. S. 341, 345, 53 S. Ct. 152, 77 L.Ed. 350; United States v. Jackson, 280 U.S. 183, 193, 50 S.Ct. 143, 74 L.Ed. 361."

The 94th Article of War being constitutional, it is, of course, obvious that the military authorities had jurisdiction to arrest and confine the appellant under its provisions.

II.

ASSUMING, ARGUENDO, THAT THE 94TH ARTICLE OF WAR IS UNCONSTITUTIONAL, ARE THOSE WHO PROCEED UNDER ITS AUTHORITY LIABLE FOR THEIR ACTIONS?

In *Cooper v. O'Connor,* 99 F. (2d) 135, at page 138, the Court of Appeals for the District of Columbia, citing supporting authorities, enunciated the prevailing rule:

> "On the contrary, if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, *or because of an erroneous construction and application of the law.*" (Italics supplied.)

See also *Kendall v. Stokes,* 3 How. 87, 98; *Jones v. Kennedy,* 121 F. (2d) 40, 42, certiorari denied, 314 U.S. 665; *Laughlin v. Rosenman,* 163 F. (2d) 838; *Keppleman v. Upston* (D.C. Ca.), 84 F. Supp. 478.

The Supreme Court, in relation to Acts of Congress having been found unconstitutional, has said in *Chicot County Dist. v. Bank,* 308 U.S. 371, at page 374, that "a principle of absolute retroactive invalidity cannot be justified". Certainly this is one type of case where such principle cannot be justified. Public policy, justice and fairness compel no other conclusion.

In view of the foregoing, it is obvious that so far as the arrest and imprisonment of the appellant is

concerned, under the 94th Article of War, he is not entitled to recovery.

III.

WAS THE 70TH ARTICLE OF WAR VIOLATED BY THE APPELLEES HEREIN, AND IF SO, DOES SUCH A VIOLATION GIVE RISE TO AN ACTION FOR DAMAGES?

It is the military law which governs the arrest and detention of persons subject to such law for offenses within the cognizance of the military authorities. 35 C.J.S. Section 20.

There is no law that requires the military to have a warrant issued prior to making an arrest, where, as in the case at bar, the alleged military offense was not committed in the presence of the arresting officer. In this connection, appellees quote the 69th Article of War, 10 U.S.C.A. Section 1541, which reads as follows:

> "Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty

by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct. (June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 802.)"

It is the 70th Article of War, Title 10 U.S.C.A. Section 1542, which prescribes the manner in which charges and specifications must be signed, investigations conducted, and courts-martial commenced. This Title only prohibits unnecessary delay in investigating and carrying the case to a final conclusion. Discretion is vested in the hands of the military.

The 70th Article of War is now set forth in full:

"Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charges will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against

him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought

to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. (June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 802.)"

That there was a delay between the time of the arrest of the appellant and the date the charges were filed against him is undisputed. That there is a reasonable explanation for such delay may be readily seen by reference to the deposition of Colonel Joel B. Olmstead, from which we now quote at length:

"Q. Can you state now what the reason, if any, was for the delay between the time of the arrest of the accused, the plaintiff in this case, Hyman A. Kronberg, and the date the charges were filed against him?

A. Coincident with the arrest of the accused, and as a result of an alleged consent to search, a number of things were found at the residence of the accused in San Francisco; and among the things found there were certain documents in the form of letters which indicated the likelihood that other property of the government might be found at the home of his brother in Brooklyn, New York. In view of the assertion by the accused that he had been discharged from the Army, and also in view of the indicated necessity for investigation in New York the FBI was called in and reports of the investigation indicated that investigations were made by the FBI in San Francisco, in Salt Lake City and in Brooklyn. We did not feel, perhaps I should say the accuser in this case, Sergeant Dart, did not feed that he could file charges until a complete

investigation of the incident had been made by the FBI, for the reason that charges by Court Martial are required by law to be sworn to either on the basis of personal knowledge of the matters stated, or in the alternative that he has investigated the matters set forth, and that they are true in fact to the best of his knowledge and belief. I believe I stated before that the first time I saw the complete FBI report was on the 25 June, which was dated the 18 of June.

Q. Dated at New York. That is part of the exhibit.

A. I believe dated San Francisco. It was received at our headquarters on the 25 June.

Q. 25 June at your headquarters?

A. Yes.

Q. Between the time of the receipt of the report and the time of the filing of the charges were there any other steps taken or any other reasons for delay in that connection?

A. Necessarily there would have to be some intervening time. There would be intervening time between the receipt of such a report, during which the accuser was relying upon the investigation, as was largely done in this case, made by the FBI or by other sources, to reach his conclusion as to what offense he believed had been committed, and seeking assistance, if necessary, in the drafting of these specifications, assembling of the necessary data to go with the charges.

Q. Do you recall whether or not there was any consideration of the possibility of this case being handled by the civil authorities?

A. There was.

Q. When was that? Was that prior to the time of the filing of the charges?

A. It was prior to the time of the filing of the charges; it was done upon receipt of the FBI report by Headquarters Fourth Air Force. I did not personally handle the matter. Major Allen, the base legal officer, came to the United States Attorney's office in San Francisco.

Q. Does Defendants' Exhibit B show anything in that connection?

A. To the best of my knowledge it does not disclose anything. As I said I did not participate but it was at my suggestion that——

Q. What was your suggestion in that respect?

A. That Major Allen submit the information that we had in connection with this matter to the United States Attorney and indicate tendering the prosecution of the accused to the civil authorities.

Q. That was your direction to Major Allen or suggestion?

A. It was a suggestion for the reason that Major Allen was not under my command.

Mr. White. When was that?

Mr. Licking. Q. That took place before you say the charges in the case were filed and subsequent to the receipt of the FBI report?

A. I don't know whether it took place before we received the report or it was very shortly, very shortly, after it.

Q. After you received the FBI report did Major Allen report to you?

A. He subsequently reported to me that the United States Attorney's office did not desire to

carry forward with the prosecution in the civil courts. I do not know whether I should state by hearsay what was told to me as a reason for that. There was one further thing in this particular case which entered into the picture of delay. Prior to the time we received the FBI report but when I had gotten in form a lot of the purported facts which were later borne out in the reports, and realizing the possibility that evidence would be taken, this would be a matter for the Army to handle, since it did involve the prospective trial of a civilian, pursuant to instructions which had been received some two years previously with reference to all such cases on the 13 June I prepared a report of the chief known facts to the Adjutant General of the Army requesting instructions.

Q. Does that report appear in that file?

A. That report appears in Defendants' Exhibit B in the form of a copy of the message which went out by teletype to the Adjutant General, and we received an acknowledgment of the receipt of that, with the advice that the problem would be considered there and we would receive an answer later. The first endorsement to that message was dated, as I recall it——

Mr. White. It will speak for itself.

A. It was received at headquarters Fourth Air Force on 7 July. Upon the receipt of it I took it to General Hale and showed him the reply which we had received.

Mr. Licking. Q. That is shown in Defendant's Exhibit B?

A. It appears as a first endorsement to the basic radiogram, and there is a true copy of that

message—it is certified as a true copy; and it is dated 3 July.

Q. And the instructions there are what?

A. The instructions are 'it is considered that the question of whether this particular accused should be held for trial and indictment by court martial is a matter for your determination.' It is addressed to General Hale. His decision in the case was that it being a matter for his determination that we would proceed to trial of the case. Immediately upon receiving that decision from General Hale I advised the Provost Marshal at Hamilton Field, and between that date, the 7th of July and 11th of July the charges were prepared and were brought to me on the morning of the 11th of July.

Q. Is there anything more in connection with it that might be of interest to the court or jury?

A. I know of nothing.

Q. I might ask one more question: is there any provision for the release of a person under arrest by military authorities on bail?

A. There is no such provision.

Q. There is no such provision?

A. No." (Tr. 121-125.)

* * * * * * *

"Q. Now basing your answer, Colonel, on your experience since 1935 in the administration of military justice, and in that connection your experience has been almost entirely in a supervisory capacity, that is you have been directing the administration of military justice by officers having the immediate duty.

A. That is correct. During the first four years I was assistant Staff Judge Advocate to the Staff

Judge Advocate of the Ninth Corps Area in San Francisco.

Q. All your experience has been in that special field supervising other officers having the power to prefer charges.

A. Yes.

Q. And make arrests?

A. Yes.

Q. You are familiar with the facts in this particular case as reflected in the record and as you testified from your informal and official conferences with different officers concerned.

A. Yes.

Q. Basing your answer on your experience and your familiarity with the facts in this case do you consider yourself competent to express an opinion as to whether or not the charges in this case, whether the time that elapsed in the case between the time of the arrest and the time the charges were preferred was within the meaning of the Article, practical—can you express such an opinion?

A. Yes, I believe I can, the determination of the question of whether there has been unnecessary delay must necessarily rest upon the facts of the particular case.

Q. In this particular case you say you are competent to express that opinion?

A. I feel I am.

Q. Can you state whether or not in your opinion the delay in this case was under the circumstances practical?

A. I do not believe there was any unnecessary or unreasonable delay at any point.

Q. Can you state the general basis of your opinion?

A. Only this, that I was in rather frequent informal contact with the people who were actually going forward with the investigation of this case in so far as the military service was concerned. I had no direct control over the activities of the FBI; in so far as the military was capable of going forward independently of the FBI I continually urged that they carry forward as rapidly as possible.

Q. As I understand, in your opinion it was necessary to await the report of the Federal Bureau of Investigation?

A. It was necessary in my opinion. Even after we had obtained all the findings of the FBI report in San Francisco, the indications were that the report of the New York office might very well result in availability of evidence which would indicate the propriety of additional charges which are not involved in the present one, charges involving additional amounts of property." (Tr. 136-138.)

Bearing in mind that there were numerous articles of clothing involved, both here and in New York, the type of clothing involved, and the investigation required both here and in New York and elsewhere, it is obvious that there was no unreasonable delay in preferring the charges against the appellant. The explanation of Colonel Olmstead is a very plausible one in the light of the situation presented herein. Here, we have a case where the appellant, when apprehended by police, was wearing the uniform of his country. It was the police that called the military authorities into the case and, with the consent of the appellant, his house was searched. A vast quantity of

clothing and equipment, ostensibly belonging to the armed forces, were found in his possession. In addition, the officers found a 32-calibre automatic pistol and a police blackjack. The appellant was then placed under arrest and taken to Hamilton Field, where he was confined. While at Hamilton Field, he attempted to bribe a guard, M/Sgt. J. W. Knowles, to send a telegram to his brother in the East. (Tr. 96-97.) The telegram read as follows:

> "Meyer, Get rid of clothes immediately. Cant explain. SOS. parties will check yours and mama's house. Ace." (Tr. 99.)

Counsel for the appellant complains that the 70th Article of War was violated, in that no charges having been preferred within 8 days, Colonel Goss failed to transmit a written report to his superior officer. That there was a report made, though only orally, is attested to by the testimony of Colonel Olmstead. In this regard, we call attention to Paragraph 15, of the Agreed Statement of Facts, which reads as follows:

> "That upon receiving the report of investigation from the CID Agents through the Provost Marshal, Colonel Wentworth Goss consulted with Major Ivan A. Allen, Legal Officer on his staff, and Colonel Joel B. Olmsted, Staff Judge Advocate of Headquarters Fourth Air Force." (Tr. 58.)

But even if the consultation by Colonel Goss with Colonel Olmstead, the Staff Judge Advocate, would not be deemed a report to a superior officer, as contem-

plated by the 70th Article of War, there is no remedy by civil suit for this alleged failure to make a report, or, as a matter of fact, for any violation of this Article. Congress has provided an exclusive remedy in the 70th Article of War, and that is a court-martial of the officer who fails in his duty in this respect. The appellees have insisted, and still insist, that the actions of the military in this regard were reasonable. The testimony of Colonel Olmstead, standing alone, would be sufficient evidence to justify their contention. But, assuming for argument's sake only, that the conduct of the appellees was not reasonable, appellant would still not be entitled to damages. Appellees will concede that the delay in bringing an accused person to trial beyond the constitutional or statutory limit is a jurisdictional question in civilian courts, but, so far as the military is concerned, the application of the due process provisions of the Sixth and Fifth Amendments has been denied by the Supreme Court many times. In *Ex parte Quirin,* 317 U.S. 1, 40, the Court said:

> "Such cases are expressly excepted from the Fifth Amendment and are deemed excepted by implication from the Sixth."

Again, in *Reaves v. Ainsworth,* 219 U.S. 296, 304, the same rule appears:

> "To those in the military or naval service of the United States the military law is due process."

See also *United States v. Weeks,* 259 U.S. 336.

The remaining question therefore is whether or not delay in bringing an accused to trial, within the meaning of the 70th Article of War, can cause a properly constituted military court to lose jurisdiction of the accused. The recent case of *Humphrey v. Smith,* 336 U.S. 695, cited in the opinion of the Court below in our case at bar, dealt primarily with the investigation procedure under the 70th Article of War, but the reasoning, particularly in the portion italicized below, applies equally to all parts of the 70th Article of War:

> "We hold that a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. It is contended that this interpretation of Article 70 renders it meaningless, practically making it a dead letter. This contention must rest on the premise that the Army will comply with the 70th Article of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article 70 pre-trial procedure. *We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War.* It was the Army itself that initiated the pre-trial investigation procedure and recommended congressional enactment of Article 70. A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials."

The question of delays, under the 70th Article of War, is dealt with in the case of *Durant v. Hiatt,* 81 F. (2d) 948, likewise relied upon by the Court below, wherein it was said:

> "The failure of the military authorities to direct an investigation of the charges against petitioner dated June 8, 1946, and his continuous confinement without such investigation and trial, until November, 1946, when the charges upon which petitioner was tried and convicted were filed and investigated, presents no ground of avoidance of the legal effect of the trial and conviction upon the charges later filed and proceeded with. It might be stated, in extenuation of the delay, that the charges involved a case of magnitude and its preparation required extensive investigation. Furthermore, separate trials were had of two others alleged to have been implicated in the offense and required the same witnesses and each of these trials continued for several weeks. There is no substantial showing in the record that this confinement or delay prejudiced the petitioner in his defense."

See also *Duval v. Humphrey,* 83 F. Supp. 457, 462, 463; *Richardson v. Zuppan,* 174 F. (2d) 829.

Accordingly this conclusion must be reached, in the language of the Court below:

> "The jurisdiction that validly attached was thus not lost and defendants are not liable in either actual or punitive damages." (Tr. 73.)

IV.

ASSUMING, ALSO ARGUENDO, THAT APPELLANT IS ENTITLED TO RECOVERY, IS HE ENTITLED TO PUNITIVE AS WELL AS ACTUAL DAMAGES?

In the Agreed Statement of Facts, the Court below was asked to determine whether the appellant was entitled to punitive damages as well as actual damages for his confinement. The Court below, as above indicated, found against him on both issues. To be entitled to recover punitive damages the actions of the alleged wrong-doer must be wanton and malicious. Here we quote from the case of *Walsh v. Segale,* 70 F. (2d) 698, 699, which lays down the prevailing rule:

> "Every legal wrong which entitles the party injured to recover damages permits him to recover compensatory damages for the injury inflicted. Not every legal wrong entitles the party to recover exemplary damages. To recover such damages, the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature. Such damages may be recovered where the wrongful act complained of is characterized by wilfulness, malice, oppression, brutality, insult, recklessness, gross negligence or gross fault. It is generally recognized that, in cases of personal torts, 'vindictive actions', such as assault and battery, slander, libel, seduction, criminal conversation, malicious arrests, and prosecutions, where the elements of fraud, malice, gross negligence, cruelty, or oppression are involved, punitive or exemplary damages may be recovered. Milwaukee & St. Paul R. R. Co. v. Arms, 91 U.S. 489, 23 L.Ed. 374;

Brown v. Evans, 17 F. 912 (C.C. Nev.), 109 U.S. 180, 3 S. Ct. 83, 27 L.Ed. 898; Hudson v. L. & N. R. R. Co. (C.C.A.) 30 F. (2d) 391; Dreimuller v. Rogow, 93 N.J. Law, 1, 107 A. 144."

The Court below, in its opinion, did not find the actions of the appellees to be malicious or wilful, but, on the contrary, determined that:

"* * * , the delay in this case was not excessive, the record disclosing that extensive investigation both here and on the East coast was necessary before the charges could be drawn." (Tr. 73.)

Since the findings of a trial court can not be set aside unless clearly erroneous, in view of the evidence in this case, the Court below should be sustained in its decision that the appellant is not entitled to punitive damages. *Gimpelson v. Kaufman* (C.C.A.-9), 167 F. (2d) 672.

As a matter of fact, because of the rule enunciated by the Supreme Court in *Wilkes v. Dinsman,* 7 How. 89, that civil courts do not interfere with the acts of military authorities within the scope of their jurisdiction unless the wrongdoer has maliciously and wilfully exercised lawful authority, there can be no recovery whatsoever for appellant, since a finding that the appellant was not entitled to punitive damages is a finding that the appellees acted without malice. The *Wilkes* case was recently cited with approval by the Supreme Court of the United States in the case of *Duncan v. Kahanamoku,* 327 U.S. 304, at page 313, wherein "the well-established power of the

military to exercise jurisdiction over members of the Armed Forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war," was conceded, although the exact point of civil redress for malicious exercise by the military of lawful authority was not considered in the *Duncan* case. See also *Dinsman v. Wilkes,* 12 How. 390, and *Keppleman v. Upston,* supra.

Appellees have, at great length, discussed the proposition of the reasonableness of their actions, not because a contrary showing of unreasonableness would have supported a claim for damages against them, but because they desire that the record be made clear in this regard. Their actions were not malicious, their actions were not unreasonable; on the contrary, their actions were reasonable, justifiable and proper, and the Court below so held. Appellees likewise ask this Honorable Court to so find.

In the opinion of the appellees the appellant has failed to state a cause of action. Because of this they have not concerned themselves with the undisputed principle that no personal liability is incurred by military men for obedience to a lawful order of a superior officer, *Despan v. Olney,* 7 Fed. Cas. No. 3822, which would be determinative of the matter as to who, among the appellees, would be liable, if the

appellant could possibly state a cause of action. See also *Tracy v. Cloyd,* 10 W. Va. 19, wherein it was held that a person in command is not liable for a trespass committed without his knowledge or abetment. See also *Keppleman v. Upston,* supra, for a discussion of the principle of liability in California, if any, of a member of the military acting under the orders of his superior officers. See likewise *Atchley v. Tennessee Valley Authority,* 69 F. Supp. 952, wherein, at page 955, the District Court for the Northern District of Alabama said:

> "The present case comes clearly within the principle that the performance by executive officers of discretionary governmental duties entrusted to them by statute is not subject to judicial review. This principle has been reiterated time and again in mandamus proceedings to compel executive action, in injunction suits to prevent executive action, and in actions such as that at bar for damages claimed to have resulted from executive actions."

Appellees have likewise not concerned themselves with the contention of appellant that under the ancient doctrine of trespass *ab initio,* the subsequent detention which he deemed to be misconduct, related back to make the original act wrongful as well, for the apparent reason, as hereinabove stated, that the detention of appellant was not improper, and for the additional reason that this doctrine of trespass *ab initio* has been greatly criticized. See *Restatement of Torts,* Section 136 (d). Appellant, in his brief, (p. 6), states that when he was turned over to the federal

civil authorities for prosecution the Grand Jury refused to indict him. Appellant no doubt introduced this collateral matter in his brief as evidence that the treatment accorded him by the military was unfair and unjust. Inasmuch as the Grand Jury proceedings are secret, appellant does not know what actually transpired during the deliberations of that body. It may be, and this is only conjecture, that the Grand Jury felt that the appellant, having been confined for 77 days, should be shown mercy in view of his prior service in the armed forces, although justice might have dictated a contrary result. In any event the action of the Grand Jury is immaterial to the problems involved herein. Our concern is with the following questions, heretofore discussed:

1. Is that portion of the 94th Article of War under attack constitutional?

2. Assuming, arguendo, that the 94th Article of War is unconstitutional, are those who proceed under its authority liable for their actions?

3. Was the 70th Article of War violated by the Appellees herein, and if so, does such a violation give rise to an action for damages?

4. Assuming, also arguendo, that appellant is entitled to recovery, is he entitled to punitive as well as actual damages?

SUMMARY.

Appellees have shown that the portion of the 94th Article of War under attack is constitutional, and that, accordingly, the arrest and confinement of the appellant herein was proper. Appellees have also shown that the 70th Article of War was not violated and that jurisdiction to arrest appellant did not lapse by reason of the lengthy delay in filing court-martial charges against him. The appellees have further shown that those who act under a statute subsequently declared unconstitutional are not liable, as they are likewise not liable for violations of the 70th Article of War.

In view of these facts, and the further fact that the Court below found the actions of the appellees to be reasonable, it goes without saying that its conclusion that the appellant was not entitled to recover either actual or punitive damages was a proper determination of the issues, and a just one.

CONCLUSION.

Appellant's motion for summary judgment was properly denied. Appellees' motion for summary judgment was properly granted. A contrary decision might have meant a flood of groundless litigation in the civil courts, not so much from former members of the military forces who might challenge the constitutionality of the 94th Article of War, but from dissident and disgruntled members of the armed forces, who, in

order to needlessly harass their superior officers, would challenge their actions by suits for damages in civil courts, on the ground that the 70th Article of War had been violated. The framers of the Constitution and the Congress of the United States which enacted the Articles of War never intended such a result, a result which might well impair the morale and discipline of the armed forces of the United States.

In view of the foregoing, it is respectfully urged that the decision of the Court below was correct and should be affirmed.

Dated, San Francisco, California,
November 21, 1949.

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